Supreme Court, U. S.
FILED
NOV 25 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-766

GARY OGDEN,

Petitioner,

vs.

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal & Correctional Complex,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To The Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Gary Ogden for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

The judgment of the District Court of Holt County, Nebraska is unreported. The memorandum opinion of the United States District Court for the District of Nebraska denying petitioner's application for a writ of habeas corpus is unreported. The opinion of the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court, is not, as of the date of this petition, reported.

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II. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is September 8, 1975, and the time of its entry is September 8, 1975. The statutory provision which confers jurisdiction on this Court to review the judgment in question is 28 U. S. C. § 1254.

—o—

III. QUESTION PRESENTED

The question in this case, originally brought under 28 U. S. C. § 2254, is whether the non-disclosure to petitioner's attorney of the written record of a polygraph examination and pre-test interview conducted upon the prosecutrix in petitioner's trial for statutory rape resulted in a denial of fundamental fairness to petitioner.

—o—

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the Right to Counsel Clause of the Sixth Amendment to the United States Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

—o—

V. STATEMENT OF THE CASE

Petitioner, now on bond, is in the constructive custody of respondent, the warden of the Nebraska Penal and Correctional Complex in Lancaster County, Nebraska, as a result of his conviction, on December 13, 1972, after a jury trial in the District Court of Holt County, Nebraska, of committing the crime of statutory rape.

On January 17, 1973, judgment was entered and petitioner was sentenced by the District Court. Notice of direct appeal to the Supreme Court of Nebraska was filed. The conviction was affirmed and an opinion was filed on December 14, 1973. The opinion of that court is published at 191 Neb. 7, and at 231 N. W. 2d 349.

Identical but separate applications for writs of habeas corpus were filed by petitioner and one Danny Atkinson (one of two other individuals tried in Holt County for crimes arising out of the same incident as petitioner's crime), in the United States District Court for the District of Nebraska. (Civ. 74-L-17 and Civ. 74-L-18.) By order, the District Court hearings on the applications were

combined. On November 29, 1974 the Honorable Albert G. Schatz entered an order denying petitioner's application (Civ. 74-L-17), but granting the application of Danny Atkinson. (Civ. 74-L-18.)

Petitioner appealed, to the United States Court of Appeals for the Eighth Circuit, from Judge Schatz' judgment denying his application for a writ of habeas corpus. Respondent appealed from the judgment granting the application for a writ of habeas corpus of Danny Atkinson. The appeals were combined for argument and on September 8, 1975 the District Court's denial of petitioner's application for a writ of habeas corpus was affirmed. (No. 75-1042.) In the same opinion, the Court of Appeals reversed the District Court judgment which granted Atkinson's application. (No. 75-1083.)

—o—

VI. STATEMENT OF FACTS

A.

FACTS AT TRIAL

Kathy Walnofer, a girl under the age of fifteen years, testified that on May 12, 1972 she left her farm home with her family and went to the town of Atkinson, Nebraska, arriving at Atkinson at about 8:15 p. m. During the evening Kathy and her sister got into an automobile driven by one Truman Rossman and occupied by four others. The six drove the streets of Atkinson, apparently aimlessly, until at about 10:00 p. m., when, while fixing a muffler on the Rossman car, they chanced upon

petitioner, Gary Seger, and Atkinson. A verbal altercation ensued between Atkinson and one of the occupants of the Rossman vehicle, but no physical contact was had between or among the occupants of either vehicle.

After driving around Atkinson further, Rossman discharged two of his passengers, Barns and Steskal, so that they could enter a bar. After retrieving Barns and Steskal, at about 11:00 p. m., the Rossman vehicle discharged its passengers at "Annie Weller's place" leaving Kathy and Rossman alone in the automobile where they remained until about 11:30 p. m.

Petitioner and his companions pulled their vehicle (a car which was being driven by Seger), alongside of the Rossman car while it was parked in front of Weller's. The occupants of petitioner's vehicle and Rossman exchanged words and then drove off, leaving Kathy and Rossman alone.

Rossman then drove Kathy out onto a country road where the vehicle was stopped, by Rossman, in response to a signal given to it by Atkinson from Seger's car, which had followed Rossman's into the country. Petitioner, Atkinson, Seger, and one other were in the Seger vehicle.

Atkinson and Seger got out of Seger's car and entered the front seat of the Rossman vehicle, with Atkinson getting under the steering wheel. By this time Truman Rossman had vacated his car. Kathy remained in the Rossman car, seated between Seger and Atkinson for about 20 minutes. Kathy testified that after some discussion with Seger as to with whom she would ride back

to town, Seger induced her from the Rossman vehicle and towards his car. Kathy got into Seger's car, apparently voluntarily along with Seger, Atkinson, and petitioner. Seger's original remaining rider got into the Rossman car behind its steering wheel. The two cars then were driven towards Atkinson, Nebraska with the Seger vehicle in the lead. Kathy asked Seger, according to her testimony, if the occupants of the Rossman vehicle knew where everyone was going and she was told that they did.

Seger drove Kathy, petitioner, and Atkinson to town to the "sale barn" where the car was stopped for a few minutes, while the three men got out of the car and had a brief conversation. After re-entering the car the four drove out of town where the car hit a mud puddle which killed its engine. Kathy and Seger got out of the car, lifted the hood and decided they would have to walk. Kathy and Seger walked about half a mile, according to Kathy, when Seger led her across a fence, and into a grove of trees where he allegedly took his and her clothing off, picked her up and laid her down, and "put his penis into (her) vagina." She testified that Seger's actions were accompanied by pain to her. Kathy then related, at petitioner's trial, that she and Seger put on their clothing and went back onto the roadway where they encountered Atkinson, who "squeezed her", and unbuckled her pants. Kathy responded "yes" to the prosecutor's inquiry, "(t)hen did the same thing happen again?" She again stated that while Atkinson was doing "the same thing" to her she felt pain. Kathy next testified, at petitioner's trial, that he told Atkinson to "hurry up" and that when Atkinson "got off" her, petitioner got on and

"put his penis into (her) vagina", while Atkinson held her down. Again she complained of pain.

At Atkinson's trial, Kathy testified that petitioner "put his penis into (her) vagina", and that during the process she had continual pain.

Kathy next related at the trial of petitioner that the four re-entered Seger's car and drove to where Atkinson's car was parked. After getting into Atkinson's car they drove around the area some more and then drove into the country where, she said, petitioner and Atkinson had intercourse with her again. Then they took her home. According to Kathy, petitioner and Atkinson threatened to ruin her reputation by branding her a prostitute if she told anyone what had happened.

B.

FACTS AT MOTION FOR NEW TRIAL

By agreement among counsel for petitioner, Gary Seger, the prosecutor, and the court, the state court motions for new trial filed on behalf of petitioner and Seger were heard upon common evidence. By further stipulation it was agreed that the evidence presented in support of the motions for a new trial for petitioner and Seger would be considered as the basis for Atkinson's motion for a new trial.

At the hearing, which commenced January 21, 1973, Nebraska State Patrol Investigator Vern C. Omer testified that on August 8, 1972 he administered a polygraph examination to Kathy at the direction of the prosecution. Subsequent to this examination, he dictated the test meth-

ods and results, including responses from Kathy to the test's relevant questions. Mr. Omer was shown a copy of his report of the polygraph examination, which had been marked for identification as Exhibit 1 to the hearing on the motions for new trial, and admitted into evidence, and he was allowed to testify from it as a document which reflected accurately past recollections recorded.

Mr. Omer explained to the court in minute detail the operation of, and method of administering, a polygraph examination. He stated that as a result of information gleaned by the examiner during a pre-test interview of the examinee, (which information is recorded in the report), the examiner formulates relevant and irrelevant questions regarding the incident which is the subject matter of the examination. "Relevant" and "irrelevant" only refer to whether the question is probative to a determination as to whether the examinee is telling the truth about the subject incident.

As a part of the statements made to him during the pretest examination of the prosecutrix, Trooper Omer was told by Kathy that Seger and Atkinson never effected penetration of her vagina. This and other statements by Kathy led Omer to frame nine "relevant" questions with respect to the events of May 12, 1972. The relevant questions as they pertain to the examination were as follows:

"25. Did you let any of the three boys have sexual relations with you?"

"26. Have you ever had sexual relations before that night?"

"27. Did Gary Seger get his penis into you?"

"28. Did you let Gary Seger take your clothes off?"

"29. Did you let Gary Seger have sexual relations with you?"

"30. Did you take off any of your clothes?"

"31. Did you help any of them have sexual relations with you?"

"32. Did you spread your legs for them?"

"33. Did you have sexual relations with anyone else besides the three boys that night?"

To question No. 25, Kathy gave no answer. To all of the remaining questions, Kathy answered "no". In response to specific inquires, Mr. Omer gave his expert opinion that when Kathy responded "no" to the questions, she was telling the truth. In fact, Mr. Omer stated his opinion that Kathy was telling the truth throughout the polygraph examination, with the possible exception of her negative responses to question No. 30. The pretest examination portion of the test showed many other inconsistencies from her testimony at petitioner's trial, including such matters as where the acts occurred and whether she and others had been drinking.

Mr. Omer had been directed by the *prosecution* to conduct the test *not to determine if force had occurred but "to determine whether the three individuals had had sexual relations with the Walnofer girl"*. To establish a predicate for an examination for this purpose, it was incumbent upon the examiner to determine whether the test subject knows what intercourse is, and this was done by Omer.

The report on Kathy's polygraph examination was typed and mailed or delivered to the prosecution. One individ-

ual was the prosecutor at all of the trials. The prosecutor received the written report from his predecessor in office, a report which exonerated Atkinson, before the first of the two trials involving Atkinson, the person tried first. He read the written report, prior to the first Atkinson trial, and he told Atkinson's and petitioner's lawyer (who was the same person), that Kathy "passed" the polygraph test. The prosecutor specifically never refused to give petitioner's lawyer a copy of the polygraph test report, but at no time did he indicate to his lawyer that a written report existed which could be turned over to him.

Seger's trial counsel, a lawyer other than petitioner's, had four to six pretrial discussions with the prosecutor. The prosecutor affirmatively informed Seger's trial counsel that the polygraph examination given to Kathy "shows that (Seger), quite clearly, had had intercourse with the (prosecutrix). That the other boys had intercourse (and) that there was no question that she was telling the truth, . . ." This, of course, was not accurate, but the conversation was communicated to petitioner's counsel by Seger's lawyer.

Until the day originally set for sentencing of Seger, the prosecutor led his lawyer and petitioner's to believe that Omer's report on Kathy's polygraph examination was oral rather than written; and this affirmative misleading was not dispelled until as late as January 16, 1973, when Seger's lawyer called the prosecutor to tell him of the results of a polygraph test administered to him by officers of the Lincoln, Nebraska police department. The results of the polygraph examination given to Seger

were introduced during the hearing on the motions for new trials, and the same reflect that Seger was telling the truth when he stated he did not have intercourse with Kathy.

It was stipulated at the State hearing on the motions for new trial that if the polygraph operators who examined petitioner and Atkinson were called as witnesses they would testify that each man was asked relevant questions about the alleged incident with the prosecutrix and that there was no untruthful reaction to any of the relevant questions. Both operators rendered an opinion that each man examined was telling the truth when he denied participation in the crime.

At the hearing on petitioner's application for a writ of habeas corpus his trial counsel testified as to the informal nature of the inter-lawyer relationships in Holt County, Nebraska and his past experience with Holt County prosecutors regarding obtaining information from the prosecutors' files. He testified further that his only prior experience involving petitioner's prosecutor and a polygraph examination (a case not involving petitioner), involved an oral report as to the results of the examination.

Petitioner's counsel also testified that he had been told by the prosecutor that a polygraph test had been given to Kathy, "that she had passed it" and that there was a problem as to penetration. Petitioner's counsel did not ask for a copy of the report as he believed it to be oral, a belief bolstered by the fact that the prosecutor voluntarily gave him other reports and materials from the prosecution file—all, incidentally, inculpatory of pe-

titioner. He also believed that he had received from the prosecutor a full disclosure of the oral report.

The prosecutor acknowledged below that he had received a written report of Kathy's test, that he was aware of its contents and that he informed petitioner's trial counsel as to the test's results. On cross-examination he acknowledged that when he advised petitioner's counsel as to the "results" of the examination he included material which was not in the report, such as the results of interviews with Omer and Kathy subsequent to the polygraph examination.

In the District Court Judge Schatz made four crucial findings of fact: (1) that the prosecution was in possession of the written polygraph report two days after it was given; (2) that the prosecutor told petitioner's lawyer that Kathy had passed the test but that *she* had expressed some doubt on the issue of penetration; (3) that the prosecutor did not offer the report to petitioner's counsel; and (4) that petitioner's counsel believed it was oral and therefore did not request it. *Ogden v. Wolff*, (Civ. 74-L-17, D. Neb. Slip Op. 5).

VII. REASON FOR GRANTING WRIT

As stated by Mr. Justice Marshall in his dissent in *Moore v. Illinois*, 408 U. S. 786, at 809.

> When the State possesses information that may well exonerate the defendant in a criminal case, it has an affirmative duty to disclose that information. While frivolous information and useless leads can be ignored, if evidence is clearly relevant and helpful to the defense, it must be disclosed.

Brady v. Maryland, 373 U. S. 83 (1963) sets forth the rule that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U. S. at 87. The heart of the holding in *Brady* is the prosecution's suppression of evidence in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. As stated by the *Moore* court in its exposition on *Brady*, the important factors to be considered are:

> (a) Suppression by the prosecution after a request by the defense; (b) The evidence's favorable character for the defense; and (c) The materiality of the evidence. These are the standards by which the prosecution's conduct . . . is to be measured.

Judge Schatz of the District Court found that the actions of the state prosecutor in withholding the fact that a written report of polygraph examination of the prosecutrix existed, in contemplation of law suppressed that evidence. With regard to the *Brady* requirement that there be a request for the production of the evidence, it is clear from all of the testimony had at the hearing on petitioner's application for a writ of habeas corpus, that petitioner's counsel in fact did request, albeit not formally, the *information* which was in the polygraph examination report. Considerable testimony below was had to the informal nature of the practice in Holt County, Nebraska, a county sparsely populated and rural in nature. That informality, coupled with the testimony of all concerned as to the statements made by the prosecutor to

petitioner's counsel with regard to what the "oral" report contained, and the finding of Judge Schatz that petitioner's counsel in fact believed the report to be oral, excuses any supposed dereliction on the part of petitioner's trial counsel in not formulating a written motion for the production of the contents of an "oral" report, the contents of which he believed he already knew.

With regard to the requirement of *Brady*, that the evidence must be favorable to the accused and material either to guilt or punishment, an additional consideration was formulated by this Court in *Giles v. Maryland*, 386 U. S. 66 (1967), in that it is a violation of due process to suppress evidence that has a direct bearing upon the credibility of the prosecution's witnesses.

Except for the physician who examined the prosecutrix, the heart of the prosecution's case against petitioner rested solely upon her testimony and credibility. The pretrial statements made by her to Mr. Omer were not only directly material and probative as to the guilt of petitioner, but also seriously put her credibility in doubt. Under the conceptual framework of either *Brady* or *Giles*, both *supra*, the suppression of the polygraph report amounted to a denial of due process as to petitioner.

The crux of the issue of petitioner's guilt turned on one, and only one, determination. Did he have sexual relations with Kathy Walnofer? It is a fact, but hardly determinative, that both during the polygraph examination, and at trial, Kathy testified that petitioner had intercourse with her. However, at petitioner's trial, she testified further that both Atkinson and Seger had intercourse with her, too. On two occasions during the polygraph examination (at a point in time, it must be remembered, when she was

under no physical or psycholological compulsion), she stated specifically that Atkinson did not have intercourse with her, and that Seger "at no time got his penis into her vagina." Further, she responded "no" to a direct inquiry as to whether she let petitioner have intercourse with her. It is impossible to conceive, in the context of sex-related offense, of any more exculpatory evidence, material or probative to the issue of guilt or to a prosecutrix' credibility that a direct statement by the victim that the sole operative element of the crime did not occur. Under the clear dictates of *Giles*, *Brady*, both *supra*, of *Napue v. Illinois*, 360 U. S. 264 (1959), *Alcorta v. Texas*, 355 U. S. 28 (1957), *Pyle v. Kansas*, 317 U. S. 213 (1942), and *Mooney v. Holohan*, 294 U. S. 103 (1935), petitioner had an absolute right to the report.

Of course, penetration by Atkinson and/or Seger was not material to petitioner's guilt. However, given the context, the suppression of Kathy's exoneration of each of them during the polygraph examination and her inconsistencies with regard to petitioner, coupled with her testimony at petitioner's trial that the other two had intercourse with her, amounts to the suppression of evidence "of such inherent significance as to represent fundamental unfairness". *Link v. United States*, 352 F. 2d 207 at 212 (8th Cir., 1965).

The Court of Appeals for the Eighth Circuit, relying upon *Link v. United States*, *supra*, adopted the position that for the suppression of impeachment evidence to amount to a denial of due process, the suppressed evidence must be of such inherent significance as to represent "fundamental unfairness." Slip Op., P. 12. As stated by the court below:

> In order to meet the 'fundamental unfairness' test from *Link*, the defendant must show that 'there was a significant chance that this added item (the suppressed evidence), developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'

Respectfully, this additional burden, placed upon the petitioner to demonstrate "fundamental unfairness" has not been demanded by this Court in *Brady, Giles* or in all cases succeeding them. In any event, respectfully, the Court of Appeals for the Eighth Circuit erred in the essence of its holding, which, under the "fundamental unfairness" test was that skilled counsel, knowing of the prosecutrix' polygraph-related statement could not have created a reasonable doubt in the mind of one juror so as to "avoid a conviction."

VIII. CONCLUSION

For the reasons and upon the authority set forth above, petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

GARY OGDEN, Petitioner

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APPENDIX

191 Neb. 7

STATE OF NEBRASKA,
Appellee,

vs.

GARY OGDEN,
Appellant.

No. 3901

Supreme Court of Nebraska,
Dec. 14, 1973.

Syllabus by the Court

In computation of the statutory period of 6 months within which the State must bring an accused to trial, periods of delay because of motions for change of venue and for a continuance granted at the request, or with the consent, of defense counsel are excluded.

Edward E. Hannon, O'Neill, for appellant.

Clarence A. H. Meyer, Atty. Gen., Calvin E. Robinson, Asst. Atty. Gen., Lincoln, for appellee.

Heard before WHITE, C. J., and SPENCER, BOSLAUGH, SMITH, McCOWN, NEWTON and CLINTON, JJ.

SMITH, Justice.

The State separately prosecuted Gary Seger, Danny Atkinson, and defendant, Gary Ogden for the offense of having carnally known and abused a female child under age 15. The prosecutions arose out of the same affair.

See State v. Atkinson, 191 Neb. 9, 213 N. W. 2d 351; State v. Atkinson, 190 Neb. 473, 209 N. W. 2d 154 (1973). A jury found Ogden guilty, and he appeals.

Ogden asserts (1) insufficiency of evidence to sustain the conviction, (2) erroneous exclusion of evidence that Seger, Atkinson, and their wives were free from gonorrhea, (3) erroneous denial of his new-trial motion based on newly discovered evidence, and (4) denial of his pretrial motion for discharge inasmuch as the State did not bring him to trial within the statutory period of 6 months from the date of filing of the information. See § 29-1207, R. S. Supp., 1972.

(1,2) Counsel for Ogden concedes that the testimony was substantially the same as the testimony at the jury trial in State v. Atkinson, and that a statement of the facts in detail would be of little value. The first three contentions are decided against him on authority of the two cases of State v. Atkinson, *supra*.

Respecting the denial of the motion for discharge, the information was filed May 30, 1972, but trial commenced December 11—a lapse of 6 months and 11 days. The question is whether proceedings on a motion for change of venue tolled the running of the statutory period.

Both Atkinson and Ogden were represented by Edward E. Hannon. On September 25, 1972, Ogden filed his motion for a change of venue. According to the journal of the court and a verbatim record of proceedings on October 3, hearings were held September 25 and 28 on the motion of Atkinson as well as on that of Ogden. The court denied the motions on October 3.

The verbatim record of the hearing immediately after the court announced its rulings on the motions marks the beginning of confusion. Hannon and the county attorney concurred that they had submitted the motion of Atkinson alone. Hannon added that the Ogden hearing would be premature "as long as we are going to try Danny Atkinson first." The record on that date, however, concludes: "THE COURT: . . . (Y)ou make application for additional hearing on Ogden. MR. HANNON: I will, at an appropriate time. THE COURT: All right . . ." No further, formal application was made.

At a hearing on November 6, 1972, "to take up . . . (Ogden's) motion for change of venue," Hannon on inquiry said he had no more evidence to introduce "at this time." He added, "See, this is a continuation of the hearing, and of course, we introduced evidence at one time. . . . (W)e introduced our evidence. . . . The state, I guess, has asked . . ." Hannon declined to concur that the evidence on the motions of Atkinson and Ogden was the same. He recalled that the State had asked for a continuance. The State introduced evidence, and the court announced it would rule that day. No such ruling, however, appears. Adjournment was had and no other motions were made until the date of trial when Ogden moved for discharge under the limitation statute.

(3) In computation of the 6-month limitation, periods of delay because of motions for change of venue, and a continuance granted at the request, or with the consent, of defense counsel are excluded. § 29-1207 (4) (a) and (b), R. S. Supp., 1972.

(4) Absence of a journal entry on November 6 and the ambiguity of the record weigh against the State. The statements of Hannon, however, are important. He at least consented to a continuance on October 3, pointing out the precedence of the Atkinson case. Notwithstanding the state of the journal and the proceedings on October 3, we infer from the proceedings on November 6 an implicit agreement among counsel and the court that Hannon need not renew his motion after the October 3 ruling. Denial of the motion for discharge was correct.

Other issues are resolved against Ogden, and the judgment is affirmed.

Affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 74-L-17
CIV. 74-L-18

DANNY ATKINSON,

Petitioner,

vs.

CHARLES L. WOLFF, JR., Warden, Nebraska Penal and Correctional Complex,

Respondent.

GARY OGDEN,

Petitioner.

vs.

CHARLES L. WOLFF, JR., Warden, Nebraska Penal and Correctional Complex,

Respondent.

MEMORANDUM OPINION

(Filed Nov. 29, 1974)

This matter is before the Court upon the petitions of Danny Atkinson and Gary Ogden for writs of habeas corpus. Jurisdiction of this Court is present under 28 U. S. C. §§ 2241 and 2254.

Mr. Atkinson and Mr. Ogden have been released on bond pending determination of their petitions. Prior to their release, both were serving state sentences imposed by the District Court of Holt County, Nebraska, following verdicts of guilty and judgments of conviction for the crime of having carnal knowledge of a female child under the age of fifteen years, Neb. Rev. Stat. § 28-408 (Cum. Supp. 1972).

The petitioners were tried separately, with Mr. Atkinson's first trial commencing in September of 1972 and resulting in a verdict of guilty. The trial judge then granted Mr. Atkinson's motion for a mistrial, and he was tried again and found guilty in October of 1972. Mr. Ogden was found guilty of the same crime in December of 1972. In January of 1973, Mr. Ogden moved for a new trial based upon newly discovered evidence. A hearing was held and evidence was received by the trial court, which evidence by stipulation of the parties was made applicable to a similar motion filed by Mr. Atkinson. These motions were denied. Mr. Atkinson's direct appeal of his conviction was affirmed, *State v. Atkinson*, 190 Neb. 473, 209 N. W. 2d 154 (1973). His appeal from the denial of the motion for new trial was also affirmed, *State v. Atkinson*, 191 Neb. 9, 213 N. W. 2d 351 (1973).

Mr. Ogden's direct appeal included the appeal from the trial court's denial of the motion for new trial, and the trial court's rulings were affirmed, *State v. Ogden,* 191 Neb. 7, 213 N. W. 2d 349 (1973).

The key factual issue upon which the trials of the petitioners focused was whether penetration of the prosecutrix by each petitioner had occurred. Under the pertinent statute, the use of force by the defendant and the resistance offered by the victim are immaterial, *Hughes v. State,* 154 Neb. 86, 46 N. W. 2d 904 (1951). Nor was there any question of identification of the petitioners, as both admitted being with the prosecutrix on the night in question.

The constitutional claim now raised by both petitioners is that the state prosecutor suppressed evidence favorable to them and thus denied them due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and as developed in *Giles v. Maryland,* 386 U. S. 66 (1967), and *Brady v. Maryland,* 373 U. S. 83 (1963). An evidentiary hearing was held by this Court, at which the state prosecutor and the attorney who represented both Atkinson and Ogden in their state trials testified. Also, transcripts of all the relevant state proceedings were introduced.

The events in question occurred on the evening of May 12, 1972, and the early morning of May 13, 1972, at which time the prosecutrix was fourteen years of age. On the night in question she was a passenger in a car driven by a boy named Truman Rossman out of the town of Atkinson, Nebraska, onto a country road. The Rossman

car was followed and eventually stopped by a car driven by one Gary Seger, in which car both petitioners and another man named Terry Stevens were riding. After the car stopped and after some discussion of an inconsequential nature, the prosecutrix entered the Seger car. She, Mr. Atkinson and Mr. Ogden drove off with Seger, while Rossman followed with Stevens as his passenger. The cars drove back through Atkinson, the Seger car proceeded out of town again, but the Rossman car ceased to follow. The Segar car stopped once, which Atkinson and Ogden testified was for the purpose of letting the three men relieve themselves. There was testimony that all three men had been drinking beer that evening. The four persons then resumed their ride until the car drove through a mud puddle and stalled. Seger and the prosecutrix then began walking down the road while Atkinson and Ogden remained in the car. Atkinson and Ogden were later able to start the Seger car and drove it down the road until they came upon Seger and the prosecutrix.

These facts are substantially undisputed. At this point, however, the testimony of the petitioners differs markedly from that of the prosecutrix. At Atkinson's and Ogden's trials, the prosecutrix stated that before Atkinson and Ogden drove up, Seger had taken her off to the side of the road near a grove of trees and had had sexual relations with her. She then testified that when Atkinson and Ogden appeared, both of them did the same thing. At both of these trials, the prosecutrix stated that Seger was in his car during the acts by Atkinson and Ogden, and that after Atkinson and Ogden were finished, all four persons drove to the town of Atkinson. Here Se-

ger let Atkinson, Ogden and the prosecutrix out and these three then entered Atkinson's car. At both trials, the prosecutrix testified that the three of them then drove out into the country again, and that Atkinson and Ogden had sexual relations with her once again, this time in the back seat of Atkinson's car. The petitioners then drove her home.

Both petitioners however, testified that after they were able to start the Seger car, they drove down the road Seger and the prosecutrix had taken, and came upon them walking in the middle of the road. They testified that Seger and the prosecutrix then entered the car and all four drove to the town of Atkinson. Seger then let Atkinson, Ogden and the prosecutrix out and these three entered Atkinson's car, and he then drove the prosecutrix home. Neither petitioner testified to observing or participating in any sexual activity of any kind with the prosecutrix.

At both Atkinson's and Ogden's trials, their attorney attempted to impeach the credibility of the prosecutrix by pointing out prior inconsistent testimony given by her at Mr. Atkinson's first trial. This prior testimony was that Seger and Atkinson did *not* penetrate her and that she *did not know* whether Ogden did, and that the reason she says Seger and Atkinson did not achieve penetration was because she could not feel them inside her. At the Ogden trial, she acknowledged that her direct testimony was different from that given at the first Atkinson trial. At the second Atkinson trial and at the Ogden trial, she was also impeached with inconsistent testimony from the preliminary hearing, concerning the seating arrangement

in the Atkinson car. At the Ogden trial, she was also impeached with inconsistent testimony from the preliminary hearing concerning the order in which Atkinson and Ogden had sexual relations with her in the second alleged set of acts, and also that she did not report these second acts until the preliminary hearing. Gary Seger testified at both the second Atkinson trial and the Ogden trial, and his testimony was consistent with that of the petitioners.

The prosecutrix was examined in the early morning of May 13, 1972, by a physician who testified at both trials and from whose testimony the juries could reasonably have concluded that the prosecutrix had had sexual intercourse with some one or more males a few hours previous to the examination. The only testimony at either trial indicating with whom the prosecutrix had intercourse came from the prosecutrix herself. Thus, she was the sole prosecution witness to the alleged acts.

On August 8, 1972, at the request of the prosecution, the prosecutrix was given a polygraph examination by a Nebraska State Patrolman for the purpose of determining whether Seger, Atkinson and Ogden had had sexual relations with her on the night of May 12, 1972, or early morning of May 13, 1972. The examination was divided into two parts: a pre-test interview in which the examiner asked the prosecutrix informally about the events of the night in question as a means of developing background information from which specific questions were formulated; and a second portion in which the examiner asked specific questions and monitored the responses of the prosecutrix for evidence of any deception in her an-

swers. A written report of the entire polygraph test was compiled by the examiner either on the evening of the examination or on the next day and was forwarded to the state prosecutor by at least August 10, 1972. On that date the prosecutor told Atkinson's and Ogden's attorney that the prosecutrix had had such a test, that she had passed the test, but that she had expressed some doubt on the issue of penetration. The prosecutor did not offer the report to the defense attorney who, believing it was oral, did not request to see it. There is no evidence whatever that the prosecutor intentionally misled the defense attorney into this misbelief. The petitioners now assert that the failure of the prosecutor to disclose this report constituted suppression of favorable evidence and a denial of due process of law, and that both petitioners are, therefore, entitled to new trials.

The Court of Appeals for this Circuit has recently indicated the considerations which should govern our examination in cases such as this. In *Evans v. Janing,* 489 F. 2d 470 (8th Cir. 1973), it was held that a three-prong test should be applied in suppression cases:

(a) Was there suppression? — This inquiry amounts to no more than whether before trial the prosecutor knew or should have known of evidence, the existence of which the defense counsel was unaware. This situation was certainly present in the petitioners' cases. The facts that the prosecutor's omission was in no way deliberate or that the defense counsel did not request the written report are not determinative on the issue of suppression. The absence of a defense request does, however, raise the standard of matriality required for the report, *Evans, supra,* at

475-6; *United States v. Keogh,* 391 F. 2d 138 (2d Cir. 1968).

(b) Was the evidence favorable to the defendant?— Since the polygraph report contained statements by the prosecutrix which are in varying degrees inconsistent with her testimony at the petitioners' trials, it could clearly have been favorable to the petitioners.

(c) Was the evidence suf"iciently material? — The sigfinificance of the suppressed polygraph report is that the petitioners claim it contained statements made by the prosecutrix inconsistent with her testimony at the petitioners' trials. The areas of alleged inconsistency for which there is support in the record are as follows:

(1) At both trials the prosecutrix stated that Atkinson had, in her words, placed his penis insider her vagina on both alleged occasions. In the pre-test interview she stated, using the same terminology, that on both occasions he attempted to do so but was unable to and, therefore, did not.

In the pre-test interview, however, she stated that Ogden penetrated her vagina with his penis on three occasions that evening.

(2) At both trials, the prosecutrix stated that Seger had had sexual intercourse with her on the first alleged occasion. In the pre-test interview, she stated that he had not done so.

(3) At both trials, the prosecutrix was asked what feeling she was during the alleged acts of intercourse, and she responded "pain." In the pre-test interview, she was

not asked whether she felt pain and did not mention pain concerning the alleged acts of intercourse.

(4) At both trials, there was no mention by the prosecutrix of drinking any liquor on the evening in question. At the pre-test interview, she stated she drank about one can of beer that night.

(5) At both trials, there was no testimony by the prosecutrix that Seger asked her age. In the pre-test interview, she stated that he did so just prior to his alleged act of intercourse with her.

(6) At both trials, the prosecutrix stated that prior to the second alleged acts, in Atkinson's car, Ogden placed her in the back seat of this car. In the pre-test interview she made no mention of any such force by Ogden.

(7) At both trials, the prosecutrix testified to two alleged acts of intercourse with her by both petitioners. In the pre-test interview, she stated Ogden had intercourse with her a third time, also in Atkinson's car.

Further, during the monitored portion of the examination, the following questions and answers, among others, were recorded:

> No. 25. Question: Did you let any of the three boys have sexual relations with you?
>
> Answer: No answer.
>
> No. 27. Question: Did Gary Seger get his penis into you?
>
> Answer: No.
>
> No. 29. Question: Did you let Gary Ogden have sexual relations with you?
>
> Answer: No.

There was no indication of deception in any of these answers.

The petitioners argue that if this report had been available to them at the respective trials, the inconsistent statements in the report would have seriously impeached the credibility of the prosecutrix. The standard for evaluating suppressed impeachment evidence was explained by the Court of Appeals in *Link v. United States,* 352 F. 2d 207, 212 (8th Cir. 1965), *cert denied,* 383 U. S. 915:

> Of course, any suppression of evidence favorable to an accused, "where the evidence is material * * * to guilt", can constitute a violation of due process. *Brady v. State of Maryland,* 373 U. S. 83, 87, 83 S. Ct. 1194, 1196-1197, 10 L. Ed. 2d 215. Evidence material to guilt is, we think, evidence which is of probative character on that question. As to evidence not of that character and having admissibility only for the purpose of impeachment or credibility attack, nondisclosure or suppression, to be violative of due process, would in our opinion, unless the situation is otherwise tainted, have to be of such inherent significance as to represent fundamental unfairness.

In addition, a somewhat greater showing of materiality is required in this case because of the absence of a defense request for the report, *Evans v. Janing, supra, United States v. Keogh, supra.*

As stated previously, the key factual issue disputed at both trials was whether or not penetration of the prosecutrix had been effected by the petitioners. There was corroboration from a physician as to the fact of penetration, and there was no evidence of intercourse by the prosecutrix with any persons other than Seger, Atkinson and Ogden on that evening. But the only evidence at

Atkinson's trial that *he* had effected penetration, and the only evidence at Ogden's trial that *he* had done so, came from the prosecutrix herself. Therefore, any prior inconsistent statement of the prosecutrix concerning the fact of penetration by Atkinson was clearly material and highly significant at his trial; and any prior inconsistent statement of the prosecutrix concerning the fact of penetration by Ogden was clearly material and highly significant at his trial.

The prosecutrix was cross-examined extensively at both petitioners' trials by use of her testimony at the preliminary hearing and at the first Atkinson trial. This testimony was substantially the same as the statements in the suppressed report referred to above as Nos. 1 and 2, and Question 27. She was also cross-examined as to other inconsistencies not referred to in the suppressed report. The respondent argues that the effect of the suppression of the report was harmless, therefore, because any further cross-examination ing the report would have been cumulative at best. With respect to any statements concerning penetration by Seger (*i. e.*, Item No. 2 above and Questions 25 and 27), the Court agrees with the respondent. Penetration by Seger was not an issue material to the guilt of either petitioner in the instant case, and therefore, any impeachment would have gone only to the prosecutrix's general credibility, which was attacked by use of the same and other statements given by her under oath previously.

With respect to the matters referred to above as Nos. 4 through 7, the degree of inconsistency certainly is open to question. But more important is the fact that these

matters do not relate to the key disputed factual issues—penetration by either petitioner. They go rather to the general credibility of the prosecutrix, which was attacked by other more damaging inconsistent statements given under oath previously. Therefore, under the *Link* standard and the higher standard imposed because of the absence of a defense request for the report, suppression of Nos. 4 through 7 in the polygraph report did not cause the petitioners' trials to be fundamentally unfair.

The matter referred to as No. 3 above pertains to pain felt by the prosecutrix during the alleged acts. The presence of pain may be of some materiality on the issue of whether penetration occurred. However, it is clear that while the prosecutrix's relation of ain came in direct response to the prosecutor's questions on that subject, the examiner did not ask any such specific questions during the polygraph test, and therefore, the only inconsistency in the statements is the failure of the prosecutrix to volunteer such information during the pre-test interview. Moreover, the physician's description of the prosecutrix's physical condition a few hours after the alleged acts amply corroborates her claim of pain. In short, the value of this portion of the report as impeachment evidence simply does not rise to the level that its suppression caused the petitioners' trials to be fundamentally unfair.

The matter referred to as No. 1 above, however, is on a different plane insofar as Atkinson's second trial is concerned. Here, the key disputed issue was whether penetration was achieved by Atkinson. It is true, of course, that the slightest penetration of the female organ

is sufficient to support a conviction for rape, *State v. Chaney,* 184 Neb. 750, 171 N. W. 2d 787 (1969). However, in the pre-test interview the prosecutrix stated unequivocally that Atkinson "did not get his penis in" on the first occasion and "couldn't get his penis into (her)" on the second occasion. While there is some corroboration that penetration did occur on that evening (the physician's testimony), there is no corroboration that Atkinson was responsible for that penetration. Indeed, in the suppressed report itself, the prosecutrix stated clearly that Ogden did have sexual relations with her three times that evening, a fact, which, if believed by the jury, could have entirely explained the prosecutrix's physical condition when examined by her doctor. There is no requirement in this case that the Atkinson jury believe that both petitioners penetrated the prosecutrix on the evening in question or that neither of them did. A third finding—penetration by Ogden but not Atkinson—was certainly a reasonably possible finding for the Atkinson jury. The suppressed statements of the prosecutrix at the pre-test interview were entirely consistent with this explanation.

The Court finds that these statements, relating to the key issue at Atkinson's trial and made by the only witness testifying that Atkinson did commit the crime, were inherently material and highly important. The question of whether, under *Link,* suppression of the report constituted fundamental unfairness is a difficult one. However, the value of the suppressed report here was considerably greater than the report of the unavailing search for burglary tools made one year after the alleged crime in *Link, supra,* and the report of a prior failure to

identify pictures of the defendant by one of two eye witnesses to the crime in *Evans v. Janing, supra.* Rather, the situation here approximates that in *Simos v. Gray,* 356 F. Supp. 265 (E. D. Wis. 1973). In *Simos* the petitioner was convicted in the state court for the crime of robbery. The key issue at his trial was identification of him as one of the robbers by the only two people who saw them. The suppressed evidence consisted of police reports containing prior statements of these two witnesses which would seriously have impeached their identification testimony. The district court granted the writ of habeas corpus, holding that the suppression of this evidence so seriously prejudiced the petitioner that a new trial was required.

The difference between this case and *Simos* is the presence of additional impeachment evidence here—the same type of statements given under oath at Atkinson's first trial. However, because of the materiality of these statements to the issue upon which Atkinson's guilt or innocence hung, the suppressed report here was not merely cumulative. The Court is of the opinion that the combined effect of the two prior inconsistent statements of the prosecutrix on the key factual issue concerning Atkinson's guilt could well have created a reasonable doubt in the minds of the jurors. This is not to say that if the state chooses to bring Atkinson to trial again, a different verdict or result will or should be reached. We simply hold that there is "a significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States v.*

Kahn, 472 F. 2d 272, 287 (2d Cir.), *cert. denied*, 411 U. S. 982 (1973), quoted in *Evans v. Janing, supra*, 489 F. 2d at 477, and that the suppression of the report constituted Atkinson's trial fundamentally unfair, *Link v. United States, supra.*

The petitioner Ogden argues that certain questions and answers in the monitored portion of the polygraph examination were of the same caliber concerning his conviction. These were:

> No. 25. Question: Did you let any of the three boys have sexual relations with you?
>
> Answer: No answer.
>
> No. 29. Question: Did you let Gary Ogden have sexual relations with you?
>
> Answer: No.

He contends that since the examination was given for the purpose of determining whether sexual relations took place (as opposed to whether force was used), the word "let," especially in No. 29 above, did not refer to permission but rather to the fact of sexual intercourse. Therefore, he continues, a negative response indicated no sexual relations were had. This theory has some plausibility although it requires speculation, both as to the meaning intended by the examiner and that understood by the prosecutrix. Considerable doubt is cast upon this interpretation by the fact that the question immediately preceding No. 29 had an obvious reference to permission:

> No. 28. Question: Did you let Gary Seger take your clothes off?
>
> Answer: No.

In any event, the petitioner Ogden's argument must ultimately fail because in the pre-test interview the prosecutrix twice stated quite clearly that Ogden did penetrate her on the night in question. Whatever benefit Ogden might have derived from the responses to question Nos. 25 and 29, this benefit would surely have been nullified when the entire report was laid before the jury.

Thus, insofar as the entire suppressed report was material to the issue of penetration at Ogden's trial, it did not constitute favorable evidence. The only evidence favorable to Ogden in the suppressed report was that discussed above which would have impeached the general credibility of the prosecutrix. As stated previously the Court finds that the suppression of this matter is not such as would constitute the trial of the petitioner Ogden fundamentally unfair.

The Court concludes, therefore, that the petition for a writ of habeas corpus filed by Atkinson should be granted and that the petition for a writ of habeas corpus filed by Ogden should be denied. Separate orders to this effect will be entered this date.

BY THE COURT:

/s/ Albert G. Schatz
JUDGE, UNITED STATES
DISTRICT COURT

JUDGMENT

(Filed Oct. 17, 1975)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1974

No. 75-1042

GARY OGDEN,

Appellant,

vs.

CHARLES L. WOLFF, JR.,
Warden, Nebraska Penal and Correctional Complex,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

This cause came on to be heard on the original files of the United States District Court for the District of Nebraska and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

September 8, 1975

A True Copy.

Attest: /s/ Robert C. Tucker
Clerk, U. S. Court of Appeals, 8th Circuit.

October 16, 1975

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1042

GARY OGDEN,

Appellant,

v.

CHARLES L. WOLFF, JR.,
Warden, Nebraska Penal and Correctional Complex,

Appellee.

No. 75-1083

DANNY ATKINSON,

Appellee,

v.

CHARLES L. WOLFF, JR.,
Warden, Nebraska Penal and Correctional Complex,

Appellant.

Appeals from the United States District Court
for the District of Nebraska

Submitted: May 16, 1975
Filed: September 8, 1975

Before GIBSON, Chief Judge,
HEANEY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The sole issue in these consolidated state habeas appeals, brought under 28 U. S. C. § 2254, is whether the non-disclosure to petitioners' attorney of the written record of the polygraph examination and pre-test interview conducted upon the prosecutrix in petitioners' trials for statutory rape resulted in a denial of fundamental fairness at those trials. We find that it did not. Accordingly, we affirm the district court's[1] denial of a writ of habeas corpus to petitioner Ogden and reverse the granting of the writ to petitioner Atkinson.

Petitioners were charged with the crime of having carnal knowledge of a female child under 15 years of age in violation of Neb. Rev. Stat. § 28-408 (Cum. Supp. 1972). The charges arose out of an incident that occurred in Holt, County, Nebraska in May of 1972. The prosecutrix was 14 years old and in the eighth grade at the time she was allegedly raped by petitioners Ogden and Atkinson and one Gary Seger.[2] Petitioners were respectively 19 and 23 years old. A detailed account of the facts in this case would serve no purpose here. A full, factual statement may be found in the Nebraska Supreme Court opinions rendered in each petitioner's appeal. *See State v. Atkinson*, 209 N. W. 2d 154 (Neb. 1973); *State v. Ogden*, 213 N. W. 2d 349 (Neb. 1973).

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1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

2 Gary Seger is not a party to this appeal. He was convicted by a state court jury and joined in petitioners' motion for a new trial based upon newly discovered evidence. Following the denial of that motion, he was placed on probation. He did not pursue an appeal to the Nebraska Supreme Court.

Atkinson was initially tried and convicted by a Nebraska state court jury in September 1972. However, that conviction was vacated when the court granted his post-conviction motion for a mistrial. He was subsequently tried again and convicted in October 1972. Ogden was convicted by a state court jury in December 1972. In each of these trials the petitioners steadfastly maintained that they had not personally engaged in intercourse with the prosecutrix, nor had they witnessed any of the other defendants doing so. The testimony of the prosecutrix was the sole evidence at each trial that the individual defendants had raped her. Her testimony was corroborated by the testimony of a doctor who examined her and found evidence that sexual intercourse had taken place.[3] Further corroboration is discussed in *State v. Atkinson, supra* at 158. Both men received sentences of not less than four or more than seven years imprisonment.

In January 1973 counsel for petitioners was apprised of the existence of a written report and transcription of the polygraph examination and a summary of the pre-test interview conducted with the prosecutrix on August 8, 1972, prior to petitioners' trials. This report contained statements by the prosecutrix that were somewhat inconsistent with her testimony at petitioners' trials. These inconsistencies related to the issue of penetration and to a

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3 The doctor who examined the prosecutrix shortly after the alleged rapes testified at Atkinson's second trial that he found a tear in her hymen from which blood was still oozing. In addition, the doctor testified that he extracted fluid from her vagina which, under microscopic examination, was discovered to contain live sperm. In his opinion, forcible entry of her vagina had occurred within three or four hours prior to his examination.

variety of minor factual details regarding the rape incident. Following this discovery, the attorneys for Ogden made a motion for a new trial based on newly discovered evidence. The motion was subsequently joined in by Atkinson and Gary Seger, the third man charged and convicted. At the hearing which was held on the motions, testimony was taken from the attorneys involved plus the polygraph examiner.

The evidence adduced at that hearing revealed the following facts. The polygraph examination of the prosecutrix took place on August 8, 1972, approximately three months after the alleged rapes. Trial counsel for petitioners stated that he had verbally suggested to the court attorney that such an examination be conducted for the purpose of determining whether petitioners and Gary Seger had had sexual relations with the prosecutrix as charged. Counsel heard nothing further about the matter until after the test had taken place.

The examination was administered by Nebraska State Patrolman Vern C. Omer, who had been contacted by the county attorney for that purpose. The examination was conducted in two parts. First, the polygraph operator interviewed the prosecutrix informally regarding the events that were alleged to have occurred on the night in question. This process provided background information from which specific questions could be formulated for use in the monitored segment of the examination. The second portion of the test involved asking these specific questions and monitoring the responses in an attempt to determine their veracity.

Within two days following the examination, the operator submitted a written report to the county attorney which contained a summary of the pre-test interview[4] and a transcription of the specific questions and answers[5] and

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4 The relevant portions of the summery provided, in substance, as follows:

> The prosecutrix's initial incident was with Gary Seger alone in a field. He ordered her to undress, and when she refused to do so, he undressed her and laid her on the ground. He removed his pants and attempted for 15 minutes to have sex with her. The report states that "at no time did he (Seger) get his penis into her vagina."
>
> Following this incident, the prosecutrix dressed herself and rejoined Ogden and Atkinson. Atkinson then undressed her and himself and attempted to have sex with her. The report stated, "He got on top of her and tried to put his penis in her vagina. He kept telling her to spread her legs a little further, however, she stated he did not get his penis in because it was too large. She stated he tried for awhile and finally gave up and got off of her." Next, Ogden got on top of her and "did penetrate her vagina with his penis," reaching a climax.
>
> Later in the evening, Ogden and the prosecutrix had sexual relations in the back of Atkinson's car. Once again he "had gotten his penis in her vagina and . . . stayed on her until he reached a climax." Subsequently, Atkinson again attempted to have sexual relations with her. "At the time he told her that she better let him do it to her, or they would be there all night. She stated that Danny Atkinson couldn't get his penis into her at this time and because it was too large and he finally gave up and quit." Finally, Ogden got on top of her once again and "did penetrate her, however, she didn't think that he reached a climax."

5 The relevant questions and answers in the monitored portion were as follows:

25. Did you let any of the three boys have sexual relations with you? No answer.

26. Have you ever had sexual relations before that night? No.

27. Did Gary Seger get his penis into you? No.

(Continued on next page)

the operator's evaluation of the individual. Upon receipt of that report, the county attorney telephoned the defense attorney who represented both petitioners and informed him that the prosecutrix had been given and had "passed" a polygraph examination. He mentioned, however, that the young woman had expressed some doubt as to penetration by the defendants.

Petitioners' attorney maintains that he was at no time prior to the trial of his clients informed of the existence of a written report. In the absence of any mention by the prosecutor, he presumed that the results were simply transmitted orally to the county attorney. As a result of this presentation, the defense attorney did not request a copy of the report. It was the failure of the county attorney to supply petitioners' attorney with a copy of this report prior to trial that led to the filing of these actions.[6]

Subsequently, these petitions for writs of habeas corpus were filed in the federal district court alleging, on

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(Continued from previous page)

28. Did you let Gary Seger take your clothes off? No.
29. Did you let Gary Ogden have sexual relations with you? No.
30. Did you take off any of your clothes? No.
31. Did you help any of them have sexual relations with you? No.
32. Did you spread your legs for them? No.
33. Did you have sexual relations with anyone else besides the three boys that night? No.

6 The motions for new trials upon the grounds of newly discovered evidence were denied by the state trial court and affirmed in **State v. Atkinson,** 213 N. W. 2d 351 (1973), and in **State v. Ogden,** 213 N. W. 2d 349 (1973).

the basis of *Brady v. Maryland*, 373 U. S. 83 (1963), that the non-disclosure of the written polygraph report constituted a denial of due process. A hearing was held in the district court at which testimony was received from the attorneys involved in the case. Based on this evidence and the trial transcripts, the district court concluded that the non-disclosure of the written polygraph report constituted a denial of fundamental fairness as to Atkinson but not as to Ogden. In this court, the state appeals from the granting of the writ to Atkinson, and Ogden appeals from the denial of habeas relief to him.

It is well established that a prosecutor has a duty to disclose to the accused all favorable evidence within his control and knowledge that is material to the defense. *Brady v. Maryland*, 373 U. S. 83 (1963). This court in *Evans v. Janing*, 489 F. 2d 470 (8th Cir. 1973), explored in detail the principles applicable to the "evolving law of favorable evidence." *Id.* at 474. No useful purpose would be served in reciting once again those general principles or in listing the dozens of cases in which they have been applied and expanded. *See generally* Annot., 34 A. L. R. 3d 16 (1970, Supp. 1974).

As was noted in *Evans*, the specific tests that must be applied in non-disclosure cases in order to determine whether a violation of due process had occurred were discussed and succinctly set forth in *Moore v. Illinois*, 408 U. S. 786 (1972). As stated by the Supreme Court in *Moore*:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is

> favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

Id. at 794-95. Petitioners' claims must be measured against these standards in order to determine whether the alleged deprivation of due process has taken place.

A. SUPPRESSION

The initial question is whether or not the prosecutor in this case suppressed the written report of the prosecutrix's polygraph examination. In this context, "suppression" means non-disclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence. *Evans v. Janing, supra*, 489 F. 2d at 475.

In the instant case, it is conceded that Robert Finn, the county attorney for Atkinson County, was aware of the polygraph report's existence in written form prior to the trial of either petitioner. Finn testified that he was sent a copy of the report shortly after the examination, discussed its contents with the examiner, and used it to some extent in preparing his case.

There is a slight degree of uncertainty regarding the defense attorney's knowledge of the written report. Attorney Edward Hannon, who represented both petitioners in their state trials, indicated that he was merely informed by Finn that the prosecutrix had "passed" the examination and that she had expressed some doubts concerning the issue of penetration. He testified that he did not

know of the existence of a written transcription until after his clients were convicted. While Finn admits that he never told Hannon that the report was written, he asserts that neither did he deceive Hannon into believing that the report was oral; nor did he ever refuse anyone access to the report. Finn claims that he would have furnished Hannon a copy of the report had a request been made. It is undisputed that no such request was made.

We have concluded that the foregoing evidence amply illustrates that the suppression element of the *Moore* test is satisfied here. The suppression in this case was not deliberate. If it were, the defense burden of showing materiality might be eased. *See, United States v. Harris*, 462 F. 2d 1033, 1035 (10th Cir. 1972). Instead, we find that the suppression in this case was more an act of negligent non-disclosure which required some showing of fundamental unfairness as a result of the suppression in order to merit relief. *United States v. Keogh*, 391 F. 2d 138 (2d Cir. 1968). *See generally United States v. Kahn*, 472 F. 2d 272, 287 (2d Cir. 1973). Similarly, the fact that no defense request was made does not relieve the prosecutor from his *Brady* obligation to disclose evidence that may be helpful to the defense. However, unless the suppression is deliberate or shocking to the conscience, the lack of a request imposes upon the non-disclosed evidence a higher standard of materiality which must be met to constitute a fundamental unfairness. *Evans v. Janing, supra*, 489 F. 2d at 475-76; *United States v. Keogh*, 391 F. 2d 138 (2d Cir. 1968). *Cf. Williams v. Wolff*, 473 F. 2d 1049, 1054 (8th Cir. 1973). The ultimate effect of this "knowing non-disclosure" in light of the failure to make

a request will be fully explored below in the section on materiality.[7]

B. FAVORABLE CHARACTER OF THE EVIDENCE

The second facet of the *Moore* test is whether or not the non-disclosed evidence was favorable to the complaining party. In applying this standard, we need not consider the degree to which the evidence might aid the petitioners. We are satisfied that the polygraph report involved here was favorable. Its value as impeachment evidence on the issue of penetration and as to other inconsistencies demonstrates its utility to the defense.

As noted by this court in *Evans*:

> The burden of demonstrating that the evidence was of a favorable nature is slight. The more crucial burden is the third test in *Moore*, the materiality of the evidence.

489 F. 2d at 477.

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7 We reject the suggestion by the state that we analyze the non-disclosure here merely in terms of the defense attorney's "lack of due diligence" in failing to make a request for the report. The concept of due diligence is related to motions for a new trial based upon newly discovered evidence, a wholly procedural device intended, it would seem, to insure that attorneys make every reasonable discovery effort prior to trial. The use of this concept to block consideration of alleged due process violations would be a triumph of procedure over substance. **See United States v. Poole,** 379 F. 2d 645, 648-49 (7th Cir. 1967). The raising of the materiality standard in the event of a failure to request evidence, discussed **supra,** is an adequate sanction.

C. MATERIALITY

Petitioners contend that the polygraph examination report constituted evidence of such critical significance and materiality to their defense that its suppression constituted fundamental unfairness which can only be remedied by the issuance of writs of habeas corpus. Where, as here, the guilt or innocence of each man depended entirely upon the testimony of the rape victim, the petitioners maintain that suppression of a prior inconsistent statement amounted to a denial of due process. In their view, the fact that the report could have been valuable to the defense in negating guilt and in impeaching the prosecution's primary witness fully satisfies the materiality requirement from *Moore* and *Brady*.

Various specific instances of the inconsistencies alluded to are offered to the court by petitioners. For example, prosecutrix testified at each of the trials that both petitioners plus Gary Seger had achieved penetration of her vagina. This was the only evidence in the record regarding the specific acts of rape by the individual defendants. When asked at trial how she knew that this penetration had occurred, the prosecutrix replied that she felt pain in the area of her sexual organs on each occasion.

However, petitioners point out that in the pre-test portion of the polygraph examination she stated that, of the three men charged with raping her, only Gary Ogden actually achieved penetration. As to Atkinson she related to the examiner that he attempted to enter her on two separate occasions but was unable to do so. A similar explanation was given regarding Seger's activities. The

pre-test interview contained no mention of pain during these incidents.

In addition, petitioners note that in the monitored portion of the polygraph examination prosecutrix responded negatively to the question, "Did Gary Seger get his penis into you?" Also, it is urged that her "No" answer to the question "Did you let Gary Ogden have sexual relations with you?" serves to exonerate that man. Petitioners contend that these contradictions were extremely material to the issue of their guilt or innocence and thus the report could not be withheld from them without causing fundamental unfairness.

Further, petitioners point to, in their words, a "plethora of contradictions" on other matters between prosecutrix's polygraph examination and her trial testimony. They maintain that these inconsistencies, while of a seemingly minor significance in and of themselves,[8] become important in the aggregate and are even further magnified due to the singular accusatory role played by prosecutrix. In their view, the impeachment of her on each of these matters, coupled with the prior inconsistent statements regarding penetration, would have provided a reasonable doubt of guilt in the minds of the jurors. Thus, they conclude, the prosecutor's non-disclosure of this inherently

8 Specifically, petitioners note inconsistencies between her trial testimony and her statements to the polygraph operator on the following topics: (1) whether or not she had been drinking beer on the night of the incident; (2) whether or not she was forced into Gary Seger's car; (3) whether or not Seger asked her age; (4) the seating arrangement in the car; and (5) whether or not she engaged in a third act of intercourse with Ogden.

material polygraph report renders their convictions constitutionally invalid.

Before we can determine whether the due process rights of Ogden and Atkinson have been violated by the suppression here involved, the evidentiary value of that suppressed report must be determined. The applicable standard of materiality for purposes of the third prong of the *Moore* test is dependent on such categorization.

For example, it has been held by this court that the suppression of any evidence which is probative on the issue of guilt or innocence can constitute a denial of due process. *Link v. United States*, 352 F. 2d 207, 212 (8th Cir. 1965). However, that case further holds that

> [a]s to evidence not of that character and having admissibility only for the purpose of impeachment or credibility attack, nondisclosure or suppression, to be violative of due process, would in our opinion, unless the situation is otherwise tainted, have to be of such inherent significance as to represent fundamental unfairness.

Id. See also United States v. Miller, 499 F. 2d 736, 744 (10th Cir. 1974).

In order to meet the "fundamental unfairness" test from *Link*, the defendant must show that "there was a significant chance that this added item [the suppressed evidence], developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *Shuler v. Wainwright*, 491 F. 2d 1213, 1223 (5th Cir. 1974) *quoting from United States v. Miller*, 411 F. 2d 825, 832 (2d Cir. 1969). *See also Evans v. Janing, supra*, 489 F. 2d at 477 & n. 19;

United States v. Kahn, 472 F. 2d 272, 289 (2d Cir.), *cert. denied*, 411 U. S. 982 (1973); *United States v. Harris*, 462 F. 2d 1033, 1035 (10th Cir. 1972). This is the standard that will be applied in the instant case. As will be set out in detail below, our examination of the suppressed polygraph report in light of the evidence adduced at petitioners' trials convinces us that its usefulness to the defense would have been as impeachment evidence.

We first consider the value of the evidence as to Ogden. Ogden's initial contention is that the prosecutrix's answer to question # 29 in the polygraph examination regarding whether she "let" Ogden have sex with her, exonerates him and is therefore directly relevant to his guilt or innocence. We find this evidence to be of little or no value. The use of the word "let" by the polygraph operator was unfortunate in that it injected an unnecessary element of ambiguity into a procedure that was intended to resolve rather than create uncertainty. Ogden assumes in his argument that the word "let" refers to the *fact* of intercourse. An equally plausible interpretation would substitute the word "permit" for "let." Under this theory, any value to Ogden arising out of the question and answer is lost.

As noted by the district court, the credibility of this "permit" interpretation is enhanced when one studies the question immediately preceding the one in issue. In response to the question, "Did you let Gary Seger take your clothes off?", she answered "No." Since there is no dispute over the fact that her clothes were in fact removed, Ogden's "fact of occurrence" definition of the word "let" makes no sense in this context. We are assuming, of

course, that the word "let" was intended to have the same meaning in these consecutive questions. In any event, the ambiguity of this question and answer is so great as to render the statement wholly without exculpatory value.

Instead we find that the report as a whole could have been useful to Ogden only as a tool for impeaching the general credibility of prosecutrix. As such it would have been primarily cumulative. She was extensively cross-examined at each trial with reference to inconsistencies between her testimony at trial regarding penetration and a myriad of other factual details compared with earlier statements made by her under oath at a preliminary hearing and at Atkinson's trials. Further impeachment on these collateral matters would not have served any appreciable credibility-impugning purpose.

In addition, the impeachment value of her allegedly conflicting statements regarding the pain she experienced during intercourse is greatly diminished by the fact that the polygraph operator, unlike the prosecutor, did not specifically inquire of her as to pain. Finally, as noted by the district court in its memorandum opinion, her claim of pain is amply corroborated by the doctor's testimony as to her post-rape physical condition.

Applying the elevated materiality standard from *Link* to this impeachment evidence, we have concluded that Ogden has not shown that the suppression of the polygraph report as to him constituted fundamental unfairness. Accordingly, the district court's denial of his petition for a writ of habeas corpus is affirmed.

A somewhat closer question is presented with regard to Atkinson's petition. Because they arose from the same factual and legal setting, the habeas petitions by Atkinson and Ogden raise essentially the same issues and are subject to the same treatment. Thus, the argument made by Ogden regarding the impeachment value of the polygraph report as it relates to prosecutrix's pain or to the long list of minor factual inconsistencies with her trial testimony is similarly found to be constitutionally unpersuasive as to Atkinson. Furthermore, Atkinson's contentions regarding inconsistencies in her testimony as to penetration by Ogden or Seger are likewise immaterial to his guilt or innocence.

However, the district court found that prosecutrix's statements in the pre-test portion of the polygraph examination regarding penetration by Atkinson were of an entirely different nature. Her unequivocal statement that Atkinson, on two separate occasions, was unable to penetrate her with his penis was found to be so "inherently material and highly important" as to justify an issuance of a writ of habeas corpus. We disagree.

> The essence of the district court's holding is that the combined effect of the two prior inconsistent statements of the prosecutrix on the key factual issue concerning Atkinson's guilt could well have created a reasonable doubt in the minds of the jurors.

Our examination of the trial transcript convinces us that prosecutrix was vigorously cross-examined on the issue of penetration at Atkinson's second trial. She was impeached on two occasions as to the differences between her trial testimony and her testimony at the preliminary

hearing. Furthermore, the version of the incident related by prosecutrix to the polygraph operator is so similar to the version on which she was impeached that its trial effect would only have been as cumulative evidence of impeachment.

The impeachment episode at Atkinson's trial came very early in the cross-examination of prosecutrix. In all candor it must be stated that, at least from the admittedly cold record before us on appeal, she was a somewhat confusing witness. On direct examination she stated simply that Atkinson "placed his penis in my vagina." However, only a few moments later the following exchange took place with the defense attorney:

Q. Kathy, do you remember the last trial?

A. Yes.

Q. When I asked you if you had ever told anybody that you did not know whether Danny Atkinson got into you?

A. Yes.

Q. And what was your answer to that question at that time?

A. That he never.

Q. That he didn't get in?

A. Yes.

Q. And were you then asked by Mr. Finn why you did not think he got it into you?

A. What was that again?

Q. Were you then, later, in the same examination, asked by Mr. Finn why you did not think he got into you?

A. Yes.

Q. And you stated at that time, "Because I did not feel anything," is that what you stated?

A. Yes.

Q. Is that still your testimony in this case?

A. Yes.

Q. Now, when you say that, are you referring only to the first alleged time, that is out near the water hole that you testified to? Is this when you are speaking of, or both times?

A. Both times.

Q. Both times. And you still do not know—you still don't think he got into you, is that your testimony?

A. Yes.

Illustrative of the confusion with which her testimony was fraught is the following question and answer, removed in sequence from the foregoing impeachment exchange by only four brief questions.

Q. Now, when these men were on you, what did they do if anything? They just laid on you for 15 minutes each?

A. No.

* * *

Q. What did they do then?

A. They put their penis into my vagina.

The foregoing appears to be a completely impeaching incident. In one breath the prosecutrix told the jury that she had previously stated *under oath* that Atkinson had not "gotten in." She further stated that she still believed that he and the other man had not penetrated

her. Yet only seconds later she apparently completely contradicted herself by announcing that Atkinson and the others had in fact penetrated her vagina. Whatever credibility she had in the eyes of the jury on the difficult issue of penetration was no doubt shaken by this series of questions and answers.

The polygraph pre-test in dispute here did not contradict her testimony regarding Atkinson's two attempts to rape her. At no time does prosecutrix contradict herself as to the fact that Atkinson twice removed his clothing and hers. Nor was she inconsistent on the issue of the sexual nature of his advances. The suppressed statement was merely at odds with her trial testimony on direct examination as to the extent to which those attempts at penetration were successful. Furthermore, her statements to the polygraph operator in which she doubted penetration by Atkinson were not at variance with her testimony at the preliminary hearing and on cross-examination at trial in which she stated that he didn't "get in." Viewed in this light, the impeachment evidence contained in the polygraph report had already been brought to bear on cross-examination.

In addition, we find persuasive on the issue of materiality the fact that the testimony and statements of prosecutrix must be viewed in light of her age and education. She was, at the time of the incident, a chaste 14 year old girl of average or below average intelligence. Legal and sexual technicalities were no doubt foreign to her. She explained the details of her rape as best she could, interspersing her testimony with somewhat technical

terms that were not necessarily confined by her to their exact scientific or medical definition.[9] Yet despite these facts Atkinson seeks to overturn his conviction because she claimed penetration of her vagina at trial but referred only to repeated attempts at penetration in her pre-test interview with the polygraph operator. We feel that Atkinson has read too much specificity into the testimony of this witness.

Finally we note with regard to Atkinson's claim that the suppressed report was favorable to him and therefore material that, under Nebraska law, even the slightest penetration of the labial region constitutes rape.

In Atkinson's direct appeal to the Nebraska Supreme Court, *State v. Atkinson*, 209 N. W. 2d 154 (Neb. 1793), it was held that:

> It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labium is sufficient. As we said in State v. Chaney (1969), 184 Neb. 734, 171 N. W. 2d 787: "The slightest penetration of the sexual organ of the female is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for rape, and such element may be proved by either direct or circumstantial evidence."

Id. at 157. Thus it seems quite apparent that the evidence in the suppressed polygraph report concerning Atkinson's unsuccessful "attempts" to have sexual relations with prosecutrix were sufficient under the law to constitute

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9 For example, when asked by the defense attorney on cross-examination her understanding of the word "vagina" she replied "It is where you go to the bathroom."

the crime with which he was charged. It appears that the report could have done him as much harm as good.

Based on our examination of the record in this case we are satisfied that Atkinson has not demonstrated that he was afforded a fundamentally unfair trial. *Link v. United States, supra*, 352 F. 2d at 212. Nor do we find a "significant chance" that the suppressed report would have produced a reasonable doubt in the minds of the jury that convicted Atkinson. *Evans v. Janing, supra*, 489 F. 2d at 477. Thus, we must reverse the district court's order granting a writ of habeas corpus to Atkinson.

Affirmed as to Ogden; reversed as to Atkinson.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.